No. 75-405

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered May 15, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit and the District Court have not been officially reported. Unofficial reports appear at 5 CCH Trade Reg. Rep. ¶60,246 (N.D.Ill. 1974) and ¶60,320 (7th Cir. 1975). Both slip opinions are set out in the Appendix hereto.

JURISDICTION

The Court of Appeals rendered its judgment and opinion on May 15, 1975 and denied a timely filed petition for rehearing on June 16, 1975. This petition is filed within

90 days from June 16, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in restraining petitioner's exercise of its First Amendment rights to speak and publish on one side of a scientific controversy of national importance.

(2) Whether the Court of Appeals erred in holding without an adversary hearing that petitioner's publications are false and misleading.

(3) Whether the Court of Appeals erred in holding that no equitable considerations apply in a proceeding under Section 13(a) of the Federal Trade Commission Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Sections 5(a) (1), 12 and 13(a) and (b), 15 U.S.C. §§45(a) (1), 52 and 53 (a) and (b) are set forth in the Appendix.

STATEMENT OF THE CASE

On August 1, 1974, the Federal Trade Commission, pursuant to §13(a) of the Federal Trade Commission Act (the "Act"), requested the District Court to enjoin, pending an adminstrative hearing before the Federal Trade Commission petitioner National Commission or Egg Nutrition's ("NCEN") publications alleged to be false and misleading and in violation of §§5 and 12 of the Act.

NCEN argued that its principal statement—that there is no scientific evidence that eating eggs increases the risk of a heart attack—is true and not misleading, the subject of greatly divided opinion in scientific circles, and protected by the First Amendment. The lower court found the statement to be the subject of a sharply divided public controversy (App. 20a) and denied the government's application on the grounds that the government had failed to carry its statutory burden of showing that an injunction would be in the public interest (App. 21a). The District court considered only affidavits, some of which squarely controverted the material allegations of the Complaint, and legal argument of counsel and, over NCEN's objection, declined to conduct an adversary hearing. No opportunity to present oral testimony, to cross-examine government affiant-witnesses, or to observe witness demeanor was afforded.

The Seventh Circuit reversed on the ground that the District Court went beyond the requirements of §13(a) by imposing on the government certain equitable burdens. (App. 5a). That court determined that the requirements of §13(a) had been satisfied (1) since the District Court had found that the government had demonstrated "reason to believe" that NCEN's statements were misleading, and (2) since the government believed injunctive relief would be in the public interest (App. 5a). Without further hearing or an analysis of the public interest, the prior restraint challenged here by NCEN was imposed.

NCEN'S constitutional claim was rejected on the principle in *E. F. Drew* v. *FTC.*, 235 F.2d 735, 740 (2d Cir. 1956) that there "is no constitutional right to disseminate false or misleading advertisements" and on the force of a "finding" by the Court of Appeals, without an adversary hearing and in the face of diametrically opposite scientific opinions, that NCEN's statements were in fact false.

REASONS FOR GRANTING THE WRIT

This case presents a classic unconstitutional prior restraint imposed by a constitutionally impermissible procedure. At issue is not merely NCEN's right to speak to America on the cholesterol-heart disease controversy without government interference, but the continued right of the citizenry to address robustly any topic of scientific controversy without threat of summary suppression or the need to conform their views to those favored by a federal agency. The decision of the Court of Appeals jeopardizes that right, and therefore should be reviewed by this court, for three important reasons.

I.

THE APPELLATE DECISION ABRIDGES CONSTITUTIONAL RIGHTS AND VIOLATES THE DECISIONS OF THIS COURT

In *Bigelow* v. *Virginia*, ... U.S. ....., 43 L.W. 4734 (June 16, 1975) this court held that commercial speech is not *per se* deprived of First Amendment protection and that it is reversible error to regulate commercial speech where the First Amendment interest outweighs the governmental interest alleged. Thus, when a constitutional prerogative is claimed, the court must on the record balance the interests at stake:

> "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." 43 L.W. 4739.

This Court explained that under its precedents a publication's "commercial aspects" or reflection of "the advertiser's commercial interests" do not negate all First Amendment guarantees:

> "The State was not free of the constitutional restraint merely because the advertisement involved sales or 'soliciations' . . . or the motive of the advertiser may have involved financial gain . . . The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.'" 43 L.W. 4737

This Court left no doubt that the rule in *Valentine* v. *Chrestensen*, 316 U.S. 52 (1972), permitting government restraints on "purely" commercial advertising, is "distinctly a limited one." *Id.*

Hence, when a paid advertisement, although factually erroneous does more than propose a purely commercial transaction. *New York Times* v. *Sullivan*, 376 U.S. 254, 266 (1964), a court may not ban it where the First Amendment interest involved is substantial. The settled rule that falsity is not a valid basis for regulating ordinary speech, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 (1971); *Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372, 1376 (D.R.I. 1971), is thus not abrogated merely because the speech in question is commercial in some respect

The rule in *E. F. Drew* v. *FTC*, 235 F.2d 735, 740 (2nd Cir. 1956) *cert. denied*, 352 U.S. 969 (1957) that "[t]here is no constitutional right to disseminate false and misleading advertisements" is, therefore, not controlling where the respondent's activities and speech are predominantly or significantly noncommercial.[1]

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[1] No claim was made that the respondent oleomargarine manufacturer and ads in *Drew* were other than purely commerical. Here NCEN earnestly asserts its noncommercial character and, had a hearing been conducted as requested, would have chronicled its noncommercial organization and operation as it did in the administrative hearings.

The Court of Appeals in this case manifestly failed to conduct the weighing of interests required by *Bigelow*. Merely because it found that NCEN's publications were "commercial" (App. 2a-3a), it talismanically swept aside NCEN's First Amendment claims without the slightest advertance to considerations which might outweigh the governmental interest against allegedly false advertising. No stock was taken *inter alia* of the strong public interest in debate on the cholesterol controversy, of the informational exposition on cholesterol protein and egg nutrition contained in the unchallenged portions of NCEN's statements, of the divided opinion (shown in the affidavits submitted to the district court) among scientists on NCEN's principal assertion, or of the political and social aspects of these proceedings (brought at the request of a quasi public association whose views were opposed by NCEN).

Since NCEN's pronouncements "did more than simply propose a commercial transaction," and clearly "conveyed information of potential interest and value to a diverse audience," 43 L.W. 3738,

> "[t]he task of balancing the interests at stake here was one that should have been undertaken by the . . . [appellate judges] *before they reached their decision.*" (Emphasis added) (43 L.W. 4739).

Had the *Bigelow* assessment been made by the Court of Appeals (as it had been by the District Court, App. 219-24a) it would have been evident that the Act could not be constitutionally applied to NCEN's statements.

The appellate court's imposition of a prior restraint upon NCEN in misplaced reliance on *Drew* thus substantially abridges, indeed abrogates, important constitutional rights, violates the law of the land laid down in *Bigelow*, and hence, justifies issuance of a writ of certiorari.

II.

THE PROCEDURE BY WHICH THE COURT OF APPEALS "FOUND" NCEN'S STATEMENTS TO BE FALSE IS CONSTITUTIONALLY DEFECTIVE

Even if the Court of Appeals could find shelter in *Drew*, application of that decision requires a finding not made by the district court that NCEN's publications were in fact false. The district court considered only whether the government had probable cause, i.e. "reason to believe" the Act had been violated and expressly disclaimed a finding on the merits. (16a, 21a, 24a). Had the district judge been required to decide the merits, the First Amendments interests at stake would have constitutionally mandated an adversary hearing, *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, 210 (1964) (seizure of allegedly obscene books); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968) (enjoining a rally); *Rosen* v. *State of North Carolina*, 345 F. Supp. 1364, 1367 (W.D. N.C. 1972) (injunction against picketing); *Astro Cinema Corp. Inc.* v. *Mackell*, 422 F. 2d 293, 296 (2d Cir. 1970) (seizure of allegedly obscene film); *Anderson* v. *Dean*, 354 F. Supp. 639, 643 (N.D. Ga. 1973) (injunction against mailing allegedly libelous letter); Cf. *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (statute permitting Postmaster General to halt use of mails for commerce in allegedly obscene materials) with the opportunity to present oral evidence and to confront and cross-examine adverse witnesses. *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268 (1970); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 103-104 (1963); *Morrissey* v. *Brewer*, 408 U.S. 471, 488-489 (1972); *Caulder* v. *Durham Housing Authority*, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *McNeill* v. *Butz*, 480 F.2d 314, 322 (4th Cir. 1973); Cf. *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Perry* v. *Sindermann*, 408 U.S. 593

(1972); *Fuentes* v. *Shevin*, 407 U.S. 67, 97 (1972); *Alford* v. *U. S.*, 282 U.S. 687 (1931); *Wiseman* v. *Reposa*, 463 F. 2d 226 (1st Cir. 1972); *Clutchette* v. *Procunier*, 497 F.2d 809, 818-820 (9th Cir. 1974). As Justice Brennan explained:

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser* v. *Randall*, 357 U.S. 513, 520-521 (1958).

The Court of Appeals, therefore, could not consistent with these constitutional requirements, "decree" as it did (App. 6a, 8a) without an evidentiary hearing that NCEN's statements were as a matter of fact false and misleading.[2]

---

[2] Such a hearing was also required by the decision in *FTC* v. *Rhodes Pharmacal Co.*, 191 F.2d, 744 (7th Cir. 1951) which the Court of Appeals thought controlling on construction of 13(a) (App. 4a), as well as by traditional practice in equity and at law. In *Rhodes*, the trial court was reversed for its erroneous belief that an injunction could not issue where the allegations of the Complaint are fully controverted by denials under oath and where no evidentiary hearing is conducted to resolve the controverted facts. *Id* 191 F.2d at 746. But, on review, the Seventh Circuit held that an injunction could issue in such a case because:

> "The District Court was *not required to find the charges made to be true*, but to find reasonable cause to believe them to be true. (emphasis added) 191 F.2d at 748.

The constitutionally defective procedure employed by the Court of Appeals thus renders *Drew* inapplicable and provides an alternate ground for granting a writ of certiorari.

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[2] (Continued)
It was precisely the absence of a need to determine the actual truth or falsity of the challenged ads in *Rhodes* that justified issuance of an injunction without an evidentiary hearing. Where, as here, a finding of actual falsity is only one of the many prerequisites to the issuance of constitutionally permissible injunction, *Rhodes* requires an evidentiary hearing.

Moreover, in applications for injunctions under Federal Rule of Civil Procedure 65:

> "most courts hold that when the written evidence [e.g., the affidavits here] reveals a factual dispute, an evidentiary hearing must be provided to any party who requests it." 11 Wright and Miller. *Federal Practice and Procedure* §2949, p. 480 (1973).

See also *SEC* v. *Frank*, 388 F.2d 486 (2nd Cir. 1968).

The Seventh Circuit's entry of a factual finding in the face of conflicting affidavits and without an adversary hearing also contravenes the practice under Federal Rule of Civil Procedure 56, which forbids the entry of summary judgment where the material facts are in dispute, 10 Wright and Miller, *Federal Practice and Procedure*, §2712 (1973), or where, as here, technical affidavits must be translated and interpreted by expert testimony. *Ortman* v. *Stanray Corp.*, 371 F.2d 154, 156 (7th Cir. 1967); *Technograph Printed Circuits* v. *Methode Electronics, Inc.*, 356 F.2d 442 (7th Cir.), *cert. denied*, 384 U.S. 950 (1966). *Sonobound Corp.* v. *Uthe Technology, Inc.*, 314 F. Supp. 878, 881 (N.D. Cal. 1970):

> "It was not the intention of Rule 56 that a case should be tried by affidavits as a substitute for trial in the usual way in open court, *where the right of cross-examination exists.*" (emphasis added) *Chemical Foundation, Inc.* v. *Universal-Cyclops Steel Corp.*, 2 F.RD. 283, 284 (W.D. Pa. 1942).

In the present case, not only are the affidavits in material conflict but the government affiants have now acknowledged in the FTC administrative hearings that other reputable scientists viewing the data relied upon by the affiants have reached directly opposite opinions.

III.

EQUITABLE STANDARDS APPLY IN A SECTION 13(a) PROCEEDING

In holding that equitable standards do not apply to a Section 3(a) proceeding (App. 5a), the Court of Appeals renders the "proper showing" requirement in Section 13(a) mere surplusage, unduly restricts judicial discretion without legislative warrant, disregards sound precedent in other circuits and misreads §13(b). More sensible and consistent with the traditional role of equity courts is the district court's construction of Section 13(a) which permits equitable discretion within the bounds of the requirements of the public interest. (App. 21a-24a)

The language of Section 13(a) is clear in its requirement of a "reason to believe" (1) that false and misleading advertising has been, or is about to be, disseminated, and (2) that injunctive relief would be in the public interest. But the statute imposes a further requirement—i.e., that of a "proper showing"—whose meaning, while not disclosed in the legislative history, *FTC* v. *Rhodes Pharmacal Co.*, 191 F.2d 744, 747 (7th Cir. 1951), must be taken to add something to the first requirements since it would otherwise be mere surplusage. *Weinberger* v. *Hynson, Wescottt & Dunning*, 412 U.S. 609, 633 (1973); *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); *U. S.* v. *Menasche*, 348 U.S. 528 (1954). This Court should, therefore, ascribe to the phrase a meaning which is consistent with the statutory purpose and compatible with the two express requirements of Section 13(a) without engaging in "judicial" legislation.

Such an approach was taken by the Court in *FTC* v. *National Health Aids*, 108 F. Supp. 340, 346 (D. Md. 1952):

> "[I]t was hardly the intention of Congress to require a district court in the exercise of the extraordinary remedy of injunction to proceed affirmatively merely on the basis of the reasonable belief of the administrative agency. Very important rights may be affected by the issuance without bond of an injunction. . . . The reasonable belief of the Commission is sufficient to warrant its application for the injunction, but the *action of the Court should be based on the general considerations that properly apply in the issuance of preliminary injunctions.*" (Emphasis added)

This construction of the term "proper showing" accords with acceptable standards of statutory construction:

> "A grant of jurisdiction to issue . . . (cease and desist) orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, *an unequivocal statement of its purpose would have been made.* . . . The qualities of mercy and practicability have made equity the instrument for nice adjustment between the public interest and private needs. . . . *We do not believe such a major departure* from that long tradition . . . *should be lightly implied.*" (Emphasis added) *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

Health Aid's approach has been followed expressly or impliedly by the Seventh Circuit and other courts and rejected only in the present case. In *FTC* v. *Thomsen-King & Co.*, 109 F.2d 516 (7th Cir. 1940), a Section 13(a) case, the Court, without hesitation, undertook to balance the equities presented to it:

> "Appellants claim that their damages will be irreparable. . . . Plaintiff, on the other hand, asserts that

> if the injunction be lifted, the damage to the public will also be irreparable.
>
> Under the circumstances, *we are to balance* the gains and losses, and as we record the score, continue or life the injunction in question." *Id.* at 519. (Emphasis added)

In *FTC* v. *Sterling Drug, Inc.*, 215 F.Supp. 327, 332 (S.D.N.Y.), *affd*, 317 F.2d 327 (2nd Cir. 1963), another Section 13(a) case, the District Court applied the traditional equitable maxim that "a preliminary injunction should not issue unless the Court is convinced with reasonable certainty that the complainant would succeed at the final hearing."

In *FTC* v. *Simeon Management Corp.*, 5 CCH Trade Reg. Rep. ¶60,223 (N.D. Cal. 1975), a Section 13(a) and (b) case, the court stated that in light of "the extraordinary and important nature of injunctive relief":

> "Reasonable belief of a violation is enough to justify the FTC seeking a preliminary injunction, but in evaluating the motion for preliminary injunction the District Court must look to the FTC's reasonable cause to believe that a violation has taken place, and *must also as a separate factor weigh the equities in favor of granting or denying the preliminary injunction. FTC* v. *National Health Aids, supra.*" (Emphasis added) *Id.* at 65, 881.

FTC v. *Rhodes Pharmacal, supra,* is not at odds with the construction of Section 13(a) urged by NCEN since it held only that the "reasonable cause" requirement of Section 13(a) modified the pertinent equitable standards by giving the trial court discretion to issue an injunction without resolving factual differences, *i.e.*, without a finding that the allegations are true. *Id.* at 74. This limited modification of normal equitable principles left for another day the question of which, if any, of the other "requirements of equity practice" evolved over "several hundred years of history," *Hecht Co.* v. *Bowles*, 321 U.S. at 321, are affected by Section 13(a).

Section 13(b), too, supports NCEN's view of Section 13(a). On its face, Section 13(b) defines a "proper showing" as an assessment of the public interest reached by "weighing the equities and considering the Commission's likelihood of ultimate success." Since Section 13(b) was "intended to codify" *Health Aids* and *Sterling Drug*, H.R. Rep. No. 93-624, 93rd Cong. 1st Sess. 31 (1973), Joint Statement of the Committee on Conference, ¶16, Congress left no doubt that it understood Section 13(a) case law to permit such weighing of the equities and consideration of ultimate success and that it intended to endorse that construction.

The need to resolve the conflict (which the Court of Appeals in this case neither discussed nor attempted to reconcile) among the various lower courts as to the construction of Section 13(a) thus provides a third reason why a writ of certiorari should issue in this case.

CONCLUSION

Even where a permissible procedure is followed in establishing a basis for a prior restraint, there is a "heavy presumption" against the restraint's constitutional validity. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). Where, as here, the procedure itself is constitutionally defective, this court should, without hesitation,

summon the matter for review, especially since the issues presented pit government orthodoxy (on a matter of divided scientific opinion) against the right to hold a contrary view. *Cf. New York Times Co.* v. *U.S.*, 403 U.S. 713 (1974). This court's failure to grant certiorari will make the government like the papacy in Galileo's time the final arbiter of scientific truth and will renounce our Founding Father's belief that free speech is as essential to the advance of science as it is to responsible government. *Curtis Publishing Co.* v. *Butts*, 338 U.S. 130, 147 (1967).

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-2043

FEDERAL TRADE COMMISSION,
Petitioner-Appellant,

v.

NATIONAL COMMISSION ON EGG NUTRITION,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 C 2185
JAMES B. PARSONS, *Judge.*

ARGUED APRIL 15, 1975 — DECIDED MAY 15, 1975

Before FAIRCHILD, *Chief Judge,* CUMMINGS and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* The National Commission on Egg Nutrition (NCEN), a private, not-for-profit corporation composed of representatives of various associations of egg producers throughout the United States, has caused to be published and broadcast statements, in the form of paid advertisements, representing in substance that there is no scientific evidence that eating eggs increases the risk of heart disease or a heart attack. The Federal Trade Commission filed an administrative complaint against NCEN alleging these statements were false and in violation of

sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, and sought from the District Court a temporary injunction under section 13(a) of the Act, 15 U.S.C. § 53(a), restraining the continuation of the advertising pending completion of the administrative proceeding. Before the District Court, the Commission offered substantial evidence that there is a medical controversy about the subject and considerable expert opinion based on experimental evidence showing a correlation, and possibly a causal connection, between high levels of dietary cholesterol resulting from eating eggs and other foods with a high cholesterol content and increased risk of heart disease. The District Court held that it had jurisdiction notwithstanding NCEN's claim that it was not subject to the Act, but denied the application on the ground that the equitable conditions required for issuance of an injunction under section 13(a) of the Act, 15 U.S.C. § 53(a), had not been met. We reverse that court's order and direct that an injunction be entered.

I.

We agree with the District Court that the Commission had jurisdiction over NCEN and the statements in question. Although NCEN is a non-profit corporation, it was formed to promote "the general interests of the egg industry," according to its articles of incorporation and by-laws. Thus, it comes within the scope of section 4 of the Act, 15 U.S.C. § 44, which defines "corporation" as "any company . . . which is organized to carry on business for its own profit or that of its members. . . ." See *Community Blood Bank of Kansas City Area, Inc.* v. *F.T.C.*, 405 F.2d 1011 (8th Cir. 1969), where the court interpreted the legislative history of this section, stating:

> ". . . Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be

> realized for themselves or their members." 405 F.2d at 1017.

In holding that the Blood Bank was a solely charitable enterprise, the Eighth Circuit distinguished the line of cases following *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948), and *Fashion Originators' Guild of America* v. *F.T.C.*, 312 U.S. 457 (1941), explaining:

> "It is evident, however, that the organizations in the above cases were designed to and did in fact bring together firms having common business concerns and such organizations or their members derived a profit over and above the ability to perpetuate or maintain their existence." 405 F.2d at 1019.

See also *National Harness Mfrs.' Ass'n* v. *F.T.C.*, 268 F. 705 (6th Cir. 1920). In the instant case, there is sufficient evidence to support the District Court's finding that NCEN was organized for the profit of the egg industry, even though it pursues that profit indirectly. The clear purpose of the statements in issue in this case is to encourage the consumption of eggs by allaying fears the public may have about their high cholesterol content. Also, given the nature of the pronouncements in question, the District Court could properly conclude that they were advertisements within the meaning of that term as used in the Act, because they were representations concerning the qualities of a product and promoting its purchase and use. See *Koch* v. *F.T.C.*, 206 F.2d 311, 317-318 (6th Cir. 1953); compare *Scientific Mfg. Co.* v. *F.T.C.*, 124 F.2d 640, 643-645 (3rd Cir. 1941).

II.

As the District Court recognized, the Commission invoked section 13(a) as the basis for the issuance of a temporary injunction. We now turn, therefore, to the showing the Commission must make in order to receive injunctive relief under that subsection

Section 13 of the Act consists of two different grants of authority to the Commission to seek injunctions against violations of the Act. Section 13(a) provides in substance that "[w]henever the Commission has reason to believe" that a corporation is engaged in dissemination of materially misleading advertising intended to induce the purchase of items of food, in violation of section 12 of the Act, and further has reason to believe that enjoining that conduct "would be to the interest of the public," the Commission is authorized to bring suit in a federal district court for injunctive relief, and "[u]pon a proper showing a temporary injunction shall be granted. . . ." By contrast, section 13(b) is a general grant of authority to seek injunctions "[w]henever the Commission has reason to believe . . . that any corporation . . . is violating . . . any provision of law enforced by the Federal Trade Commission," and provides that "[u]pon a proper showing that, *weighing the equities and considering the Commission's likelihood of ultimate success,* such action would be in the public interest, . . . a preliminary injunction may be granted." (Emphasis added.)

Congress added subsection (b) in 1973, leaving subsection (a) unchanged. By providing the traditional equity standards italicized in the above quotation and the permissive "may" in (b), while leaving (a) without those standards and with its peremptory "shall," Congress indicated an intention that those standards be applied in proceedings under (b) but not in those under (a), and no intention that the judicial interpretations of (a) should be affected by the amendment. This inference is not refuted by the somewhat ambiguous legislative history of the amendment. Accordingly, our decision in *F.T.C.* v. *Rhodes Pharmacal Co.,* 191 F.2d 744 (7th Cir. 1951), remains the law and is controlling in this case. We there held that the following standard was applicable under subsection (a):

> ". . . all the Commission had to show was a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in the dissemination of false advertisements . . . in violation of the Act. . . . This is to say, in the instant case, the court had only to resolve the narrow issue of whether there was 'reasonable cause' to believe that the alleged violation had taken place." 191 F.2d at 747-748.

Under this standard, the Commission in the case at bar was entitled to temporary injunctive relief against NCEN's advertising statements to the effect that there was "no scientific evidence" of any relationship between dietary cholesterol intake resulting from eating eggs and increased risk of heart disease. The District Court explicitly found that the Commission had demonstrated that it had reason to believe NCEN's advertisements to be materially misleading. The Commission also showed that it believed an injunction would be in the best interest of the public, a statement which the District Court credited to the extent that more people were likely to be misled if the pronouncements were permitted to continue. It was error for the District Court to go further than the statutory requirements, which had been satisfied according to *Rhodes,* by requiring the Commission to justify its request for an injunction on the basis of a balancing of the equities and the likelihood of ultimate success, the traditional equity standards prescribed in subsection (b).

III.

NCEN argues that the issuance of an injunction would at least raise a serious First Amendment question. As Chief Judge Fairchild's concurring opinion suggests, the First Amendment is not "wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy." Cf. *Pitsburgh Press Co.* v. *Human Relations Commission,* 413 U.S. 376, 384-389 (1973); *Barrick Realty, Inc.* v. *City of Gary,* 491 F.2d 161, 163-164 (7th Cir. 1974); compare *Breard* v. *Alexandria,* 341 U.S. 622 (1951). NCEN has

done more than espouse one side of a genuine controversy, however. It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading. "There is no constitutional right to disseminate false or misleading advertisements." *E. F. Drew & Co.* v. *F.T.C.*, 235 F.2d 735, 740 (2d Cir. 1956). The First Amendment problem suggested above is therefore not before us.

IV.

Regardless of the reach of the First Amendment in this area, we think the injunction should not go so far as to prohibit NCEN from making a fair presentation of its side of the controversy. NCEN should, as the Commission contends, be enjoined from disseminating in commerce or by mail advertising containing statements to the effect that there is no scientific evidence that increased intake of dietary cholesterol resulting from eating eggs increases the risk of heart disease or attendant or related conditions or other statements tending to misrepresent the state of scientific evidence on the subject in question. The injunction should not, however, prohibit NCEN from stating that there is scientific evidence supporting the theory that dietary cholesterol intake is not harmful, or from describing that evidence, provided that it also states that there is substantial contrary evidence.

In order to avoid further delay, we are directing that an injunction in the form appearing in the Appendix to this opinion* be entered by the District Court on remand.

REVERSED AND REMANDED WITH DIRECTIONS

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* NCEN has moved for leave to supplement the record with copies of advertisements published by it shortly before and after the oral argument in this court. While we would ordinarily not consider evidence that was not before the District Court, we grant the motion, because we are framing the temporary injunction, and the recent advertising bears on the nature of the provisions that should be included in that injunction.

FAIRCHILD, *Chief Judge,* concurring. The material involved consists of statements of position with respect to a controversial issue. It is deemed advertising because its dissemination is caused by those whose profit interests are served by the view espoused.

We are in an area of difficulty in considering whether and to what extent the First Amendment protects such material. It is clear that "purely commercial advertising" is treated differently from other communication of information and opinion in terms of applicability of the First Amendment. *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Compare, *Pittsburgh Press Co.* v. *Human Rel. Comm'n.*, 413 U.S. 376, 384 (1973) with *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964). See also, *Breard* v. *Alexandria,* 341 U.S. 622 (1951). I question whether the cases mean that the First Amendment is wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy.

Mr. Justice Brennan has recently observed:

> ". . . while it is possible that commercial advertising may be accorded less First Amendment protection than speech concerning political and social issues of public importance, compare *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), with *Schneider* v. *State,* 308 U.S. 147 (1939), and *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951), with *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), it is 'speech' nonetheless, often communicating information and ideas found by many persons to be controversial." *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 314 (Brennan, J., dissenting) (Emphasis in original, footnote omitted).

Like political speech, the purveyor of a commercial advertisement has an interest in expression, and the mere fact that government seeks to regulate advertising bespeaks the interest the recipients have in receiving the message. See Note, *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191 (1965). Most impor-

tantly, society, as a whole, has a substantial interest in the free interplay of opinion when an advertisement addresses a matter of current public debate.

When we are dealing with a genuine controversy, I do not think that mere reason to believe that a statement is false or misleading is a sufficient basis for an injunction. I conclude that the First Amendment at least requires a higher standard. I can, however, concur in ordering a limited injunction in this case because I consider that it has been demonstrated that the particular statements enjoined are misleading.

APPENDIX

Injunction Order

Petitioner, the Federal Trade Commission, having invoked the authority of this court pursuant to 15 U.S.C. § 53(a) for the purpose of temporarily enjoining the respondent from disseminating advertisements which the Commission has reason to believe violate section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52; the court hereby finds as follows:

The court has jurisdiction over the subject matter and the respondent.

Eggs are a "food" as defined by 15 U.S.C. § 55(b).

The Federal Trade Commission has made a proper showing that it has reason to believe that the respondent's advertisements for eggs which have been disseminated in commerce or through the United States mails were false in violation of 15 U.S.C. § 52.

The Federal Trade Commission has made a proper showing that the issuance of a temporary injunction against respondent's continued dissemination of advertisements which the Commission had reason to believe were false, pending completion of its administrative proceeding with respect to respondent, would be in the public interest;

It Is Therefore Ordered that respondent, National Commission on Egg Nutrition, is forthwith enjoined from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commisison Act, which directly or indirectly:

1. Represents that there is no scientific evidence that consuming eggs, even in large quantities, increases the risk of heart attacks, heart or artery disease, or any attendant condition;
2. Represents the insignificance of the available scientific evidence that the consumption of eggs may increase the risk of heart attacks, heart or artery disease, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence, if any, that eating eggs does not increase the risk of heart attacks, heart or artery disease, or any attendant condition;
3. Represents that there exists, or describes, scientific evidence which supports the theory that eating eggs does not increase or in any way decreases the risk of heart attacks, heart or artery disease, or attendant conditions, unless such representation is accompanied by a statement that this theory and its supporting evidence are the subject of considerable scientific controversy, and there is much evidence to the contrary.

It Is Further Ordered that respondent shall:

Distribute or mail a copy of this order, within 30 days from the date of this order, to each of its members and to all persons, corporations, associations or other entities to which it has provided advertising materials for publication or republication and which contain any of the claims which respondent is enjoined by this order from making;

Furnish petitioner, within 30 days from the date of this order, with a list of all members, persons, corporations

or other entities to whom it has furnished copies of this order as required above; and

Notify the Commission at least 30 days prior to any proposed change in NCEN, such as dissolution, emergence of a successor corporation, or any other change in the corporation which may affect compliance with obligations arising out of this order.

This order shall continue in effect until the pending complaint against respondent by petitioner Federal Trade Commission (F.T.C. Docket No. 8987) is either dismissed by petitioner or until a final order issued by petitioner against respondent in that matter becomes final as defined by section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, unless sooner vacated or modified by this court.

IN THE UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

No. 74 C 2185

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

NATIONAL COMMISSION ON EGG NUTRITION,

Respondent.

MEMORANDUM OPINION AND ORDER

Petitioner, the Federal Trade Commission, has applied to this Court for an order granting a temporary injunction against respondent, National Commission on Egg Nutrition, to restrain certain publications pending a determination of a matter being presented to the Commission. Petitioner's application was made pursuant to Section 13 of the Federal Trade Commission Act, 15 U.S.C. §53. Respondent has opposed any grant of the application on the grounds that the Court lacks jurisdiction, that an injunction would unlawfully abridge its constitutional rights of freedom of speech and of the press, and that the statutory and equitable prerequisites for an injunction have not been satisfied.

I.

Before proceeding to rule on petitioner's application, a review of those sections of the Federal Trade Commission Act which the Court found relevant seems necessary. Aforementioned Section 13 of the Act states in part as follows:

> "(a) Whenever the Commission has reason to believe —
>
> (1) that any person . . . is about to engage in . . . the causing of the dissemination of any advertising in

violation of section 12 (15 U.S.C. §52), and

(2) that the enjoining thereof . . . would be to the interest of the public, the Commission . . . may bring suit . . . to enjoin . . . upon proper showing a temporary injunction . . . shall be granted . . .

"(b) Whenever the Commission has reason to believe —

(1) that any person . . . is violating, or is about to violate, any provision of law enforced by the FTC, and

(2) that the enjoining thereof . . . would be in the interest of the public — the Commission . . . may bring suit . . . to enjoin . . . upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a temporary restraining order or a preliminary injunction may be granted . . . ."

15 U.S.C. §53(a) and (b).

Section 12 of the Act, mentioned in Section 13(a), states in part as follows:

"(a) It shall be unlawful for any person . . . to disseminate, or cause to be disseminated, any false advertising —

(1) . . . in commerce by any means, . . . which is likely to induce, directly or indirectly the purchase of food . . . or

(2) By any means . . . which is likely to induce, directly or indirectly, the purchase in commerce of food . . .

(b) The dissemination or the causing to be disseminated of any false advertisement . . . shall be an unfair or deceptive act or practice in commerce within the meaning of Section 5 (15 U.S.C. §45) . . . ."

15 U.S.C. §52(a) and (b).

The term "false advertisement," as used in Section 12, is statutorily defined in Section 15 of the Act, which states in part as follows:

"(a) (1) The term 'false advertisement' means an advertisement . . . which is misleading in a material respect . . . ."

15 U.S.C. §55(a) (1).

And Section 5 of the Act, mentioned in the aforequoted Section 12(a) of the Act, states in part as follows:

"(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

15 U.S.C. §45(a).

II.

In requesting an order of injunctive relief, petitioner has argued that any hearing on its application should be a summary proceeding, that is, without any presentation of oral testimony or oral cross-examination. Petitioner's position is quite similar to the one it took in another case recently before me, entitled *FTC* v. *Borden, Inc.*, 74 C 1849. In opposing petitioner's request, the respondent has argued that injunctive relief may only be ordered under Section 13, 15 U.S.C. §53, after a full evidentiary hearing has been held.

For reasons which will be stated below, I reject both the petitioner's and the respondent's position regarding the nature of a court proceeding under Section 13, 15 U.S.C. §53. The Court is of the opinion that it may act in either a summary manner or after a more complete

evidentiary hearing is held; the decision as how to act under Section 13 must be made on a case-by-case basis, and that decision will depend on what the Court considers as necessary for a "proper showing" in any one case. Thus, a "proper showing" may be made by the FTC in some cases upon mere presentation of affidavits, while in other cases such a showing may be made only after the Court has had the benefit of both affidavits and counter-affidavits, and yet in still other cases such a showing may be made only after the Court has had the benefit of a full evidentiary hearing.

III.

I am of the opinion that in certain similar cases, a full evidentiary hearing might be necessary before the Court can decide whether a "proper showing" under Section 13, 15 U.S.C. §53, has been made because of my view on the meaning of the statutory phrase "proper showing." Contrary to the petitioner's assertions, I believe that the phrase means more than a showing that the FTC, in fact, has reason to believe. Rather, I feel that the phrase also includes at least some of the equitable burdens which those seeking the extraordinary remedy of injunctive relief have traditonally borne.

I have found very little precedent on the Federal Trade Commission's utilization of Section 13, 15 U.S.C. §53, and thus have very little guidance on what is meant by the phrase "proper showing" in Section 13(a) and (b), 15 U.S.C. §53(a) and (b). I note that although the same phrase is used both in Section 13(a) and Section 13(b) of the FTC Act, the two subparagraphs are different in their granting of discretionary powers to the district courts. Section 13(a) says "upon a proper showing . . . an injunction shall be granted" while Section 13(b) says "upon proper showing . . . (an) injunction may be granted." And Section 13(b) explicitly requires the courts to weigh the equities and consider the Commission's likelihood of ultimate success in exercising their powers while Section 13(a) contains no such explicit requirement.

Notwithstanding the differences in statutory language between 13(a) and 13(b), I am of the opinion that the phrase "proper showing" has the same meaning when used both in Section 13(a) and Section 13(b), 15 U.S.C. §53(a) and (b), and that within that meaning is encompassed the Commission's burden of at least showing the necessary public interest, a favorable balance of the equities, and the probable chance of success. The drafters of the recently enacted Section 13(b) said that this provision was a codification of the decisions in *FTC* v. *National Health Aids,* 108 F.Supp. 340 (D.Mary. 1952) and *FTC.* v. *Sterling Drug, Inc.,* 317 F.2d 669 (2nd Cir. 1963); these two cases involved Section 13(a). The drafters may have misread *Sterling Drug,* however. See *Sterling, supra,* 317 F.2d at 678 and 1973 *U. S. Congressional and Administrative News* 2533. Furthermore, the language of Section 13(b) appears to include all circumstances which fall under Section 13(a). Section 13(a) applies when a person is about to engage in a violation of Section 12, which violation is also a violation of Section 5 according to Section 12(b) and which is therefore also subject to FTC enforcement according to Section 5(a) (6). Section 13(b) applies when a person is about to engage in a violation of any provision of law enforced by the FTC, presumably including Section 12. And finally, case law under the older Section 13(a) recognizes that the broad equity principles explicitly laid out in Section 13(b) are implicit in Section 13(a) and in its phrase "proper showing." For example, the Court in *National Health Aids, supra,* said: ". . . the action of the court should be based on the general considerations that properly apply in the issuance of preliminary injunctions." 108 F.Supp. at 346. Petitioner has relied on the case of *FTC* v. *Rhodes Pharmacal Co., Inc.,* 191 F.2d 744 (7th Cir. 1951) when arguing for a very limited discretionary power of the Court under Section 13, 15 U.S.C. §53; however, this Court notes the disapproval of that case in the later *National Health Aids* case, *supra,* 108 F.Supp. at 346, which at least the Congress viewed as the prevailing law.

In light of the foregoing analysis of the statutory phrase "proper showing" and of the possible means in which the FTC may be allowed to make such a showing in a case under Section 13 of the Federal Trade Commission Act, I have concluded that in the present case an evidentiary hearing will be unnecessary and that the Commission's application can be ruled with the benefit of affidavits, counter-affidavits, legal memoranda, and oral argument. In ruling on the petition, however, both parties must understand that the decision to grant or deny the relief requested should in no way be construed as a finding on the merits of the Commission's claims against the respondent which are presently being heard in another forum.

IV.

Prior to considering whether or not the Commission has made a proper showing sufficient to warrant the issuance of an injunction, I must first consider the respondent's contention that this Court is without jurisdiction. Respondent argues that it is not a corporation, as defined by the FTC Act in Section 4, 15 U.S.C. §44, and that its pronouncements are not advertisements within Sections 5, 12 and 13 of that Act, 15 U.S.C. §§45, 52, 53(a) (1) and 55 (a) (1).

I am of the opinion that the respondent is a corporation under Section 4, and that it is therefore subject to the FTC's jurisdiction under Section 5(a) (6) of the Act, 15 U.S.C. §45(a) (6). The respondent is a "company . . . organized to carry on business for (the) . . . profit . . . of its members," Section 4, 15 U.S.C. §44. It is true that the respondent may not gain profits for itself or profits which it then distributes to its members. However, its activities do generate direct profits for its members in that many of its members are egg producers or are otherwise connected with the egg industry and that respondent's activities do directly promote, at least to some extent, the financial health of the egg industry. Although the respondent is a not-for-profit corporation, the law is clear that

the FTC has jurisdiction in certain instances over non-profit corporations. See, for example, *FTC* v. *Cement Institute,* 333 U.S. 683 (1948). Respondent's attempt to analogize or otherwise compare its own members with scientists at p. 15 of its Memorandum in Opposition is clearly erroneous; in the present case, members of the respondent directly and personally profit from the respondent's activities while scientists usually do not. *Koch* v. *FTC,* 206 F.2d 311 (6th Cir. 1953).

I am of the further opinion that even if I assume that the respondent's pronouncements, which are here under attack, are not advertisements within the meaning of Section 15(a) (1) of the Act, 15 U.S.C. §55(a) (1), I would still have jurisdiction. Jurisdiction would lie under Section 13(b) of the Act, 15 U.S.C. §53(b), because the respondent's pronouncements could be believed by the FTC to be "unfair or deceptive acts or practices" under the U. S. Supreme Court's recent reading of Section 5(a) (1), 15 U.S.C. §45(a) (1), in the case of *FTC* v. *Sperry and Hutchinson Co.,* 405 U.S. 233, 92 Sp.Ct. 898 (1972). That recent Supreme Court decision held that the FTC could proscribe certain practices pursuant to Section 5 if they are unfair or deceptive in their effects upon consumers, regardless of their nature or quality as competitive practices of their effects on competition or their antitrust implications. The Supreme Court thus recognized the power of the FTC to investigate the fairness of certain practices in terms of the "public values," i.e., whether they cause substantial injury to consumers. *FTC* v. *Sperry and Hutcheson Co., supra,* 92 Sp.Ct. at 905.

V.

In opposing the petitioner's application, the respondent has also contended that the granting of any injunctive relief would violate its constitutional rights under the First Amendment and thus that no such relief can be granted. Respondent has relied, in large part, on the decisions in *Scientific Manufacturing Co.* v. *FTC,* 124 F.2d 640

(3rd Cir. 1941) and *Koch* v. *FTC, supra.* I find that the issuance of injunctive relief in this case would not necessarily violate respondent's constitutional rights, and note that support for this position can be found in the cases cited by the respondent.

The Court in *Scientific Mfg. Co.* recognized that the 1938 amendments to Section 5(a) (1) of the FTC Act broadened the jurisdiction of the Commission, a recognition later made by the Supreme Court in *FTC* v. *Sperry and Hutchinson Co., supra.* 124 F.2d at 643-644. The Court in *Scientific Mfg. Co.* also discussed the nature of the relationship between the FTC's powers under the Act and the First Amendment; in doing so, it stated:

> "It follows from what we have said that, the present petitioners not being engaged or materially interested in the cooking utensil trade, the Commission was without power to enjoin their sale and distribution of the pamphlets which they published concerning the use of aluminum cooking utensils and, further, that the publication, sale, and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice within the contemplation of the Federal Trade Commission Act, as amended, if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief."
>
> 124 F.2d at 644.

Unlike the petitioners in *Scientific Mfg. Co.,* the respondent and its members in this case are materially interested and are engaged in the egg industry. The Court in *Scientific Mfg. Co.* recognized this distinction when it cited the following in a footnote reference:

> "In *Perma-Maid Co.* v. *FTC,* 121 F.2d 282, where a distributor of stainles steel cooking utensils procured some of the Force pamphlets for use of its salesmen in inclining prospective customers to stainless steel rather than aluminum ware, the FTC restrained

> the distributor's use of the pamphlets and its action was sustained by the Circuit Court of Appeals for the Sixth Circuit. The *Perma-Maid* case, involving as it does the use of pamphlets which Force publishes and distributes well illustrates a permissible exercise of the Commission's jurisdiction and serves to point the pertinent distinction between that case and the present." 124 F.2d at 644, footnote 8.

The Court in *Koch, supra,* also recognized a similar distinction which is quite relevant to the present case. On the one hand, the Court in *Koch* found that a book, entitled *The Chemistry of Immunity,* which was widely distributed among physicians and which explained the author Dr. Koch's theory of heightening the natural immunity of the body against disease, was not subject to Sections 5, 12 or 15(a) of the Act. The Court also reached a similar conclusion with respect to an address delivered by Dr. Koch to the College of Physicians and Surgeons in Quebec. *Koch, supra,* 206 F.2d at 317. On the other hand, the Court found that other publications dealing with Dr. Koch's theory were subject to Section 5 of the Act because they included, ". . . in addition to a concise statement of Dr. Koch's theory, persuasive selling arguments to induce the purchase of the drugs and give detailed price lists." *Koch, supra,* 206 F.2d at 318. Here, the respondent's pronouncements have the effect of inducing their readers to purchase more eggs — whether the respondent intended such an inducement or not.

In rejecting the respondent's First Amendment argument, it is not my intention to curtail the respondent's declarations of all its honest opinions. Again, the decision by the Third Circuit in *Scientific Mfg. Co., supra,* seems relevant in its following statements:

> "Surely Congress did not intend to authorize the FTC to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion, however, may become material to the

> jurisdiction of the FTC and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor." 124 F.2d at 644-645.

And although I am of the opinion that the granting of any form of injunctive relief to the petitioner would not necessarily violate the respondent's First Amendment constitutional rights, I am of the further opinion that the speech elements of the respondent's pronouncements should be considered when this Court decides whether or not injunctive relief would be in the public interest. From the evidence presented thus far, it is quite clear that a major dispute is now raging both within the medical community and the public at large about the nature of the relationship — if any — between dietary cholesterol intake and coronary heart disease. Because a significant portion of our population is concerned about the risk of heart disease, the nature of any relationship is a matter of public health and legitimate public interest. *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F.2d 706 (9th Cir. 1968), *cert. den.* 89 S.Ct. 1197 (1969); *Lewis* v. *Reader's Digest Association, Inc.*, 366 F.Supp. 154 (D.Mont. 1973). Thus, assuming that the respondent's pronouncements are false or deceptive, even though some people are probably misled, it is also highly probable that other people become more knowledgeable about the cholesterol controversy through the respondent's pronouncements whether they are also misled or not.

VI.

The question now remaining before me is this: Has the petitioner made a sufficient showing to warrant the issuance of injunctive relief? In order to have made a sufficient showing, the petitioner must have demonstrated that it had a reason to believe that the respondent is violating or is about to violate Section 5(a) of the FTC Act, 15 U.S.C. §45(a), as well as a demonstration of the necessary public interest, the favorable balance of

the equities, and the probable chance of its ultimate success. In assessing the sufficiency of the petitioner's showing under the FTC Act, this Court must not, of course, serve as simply the rubber stamp which validates petitioner's applications; rather, this Court must exercise independent judgment in line with the relevant statutory standards and general principles of equity encompassed within the Act.

I find that the Commission has carried its initial burden, in that it has shown reason to believe that the respondent's pronouncements are at least misleading. This finding should not, however, be deemed to render fruitless any activities by the respondent in the pending FTC administrative proceeding to produce further evidence in support of its contention that the administrative proceeding is improper because the Commission lacks the requisite "reason to believe." 15 U.S.C. §45(b); Cf., *FTC* v. *Sterling Drug, Inc., supra,* 317 F.2d at 678. My finding of a reason to believe under Section 13, 15 U.S.C. §53, is based upon the various affidavits which put into doubt the assertion that there is no scientific evidence that eating eggs increases the risk of heart attacks, as well as other assertions by the respondent.

I also find, however, that the Commission has not sufficiently carried the statutory burden of showing that it would be to the "interest of the public," as stated in both Sections 13(a) and 13(b)-15 U.S.C. §53(a) and (b), to enjoin the respondent's activities complained of pending the outcome of the administrative proceeding involving the same petitioner and respondent.

In its Memorandum of Law, the petitioner states:

> "Petitioner's reason to believe that N.C.E.N. is falsely advertising the relationship between eggs and heart disease and heart attack is in itself sufficient 'public interest' for purposes of this injunctive proceeding." Petitioner's Memo in Support, at p. 22.

This interpretation of the phrase "public interest" is clearly inaccurate in light of the preceding analysis of the FTC Act. The petitioner goes on to state:

> ". . . the Commission also has reasonable cause to believe that increased egg consumption by the public as a result of respondent's advertising campaign poses a serious and significant danger to the public health." Memo at p. 22.

This statement also appears not to be accurate. Affiant Schrader's uncontradicted statement is that the egg supply for the next seven months is already fixed and cannot be expanded. Thus, it does not appear to me that the respondent's pronouncements herein attacked can increase egg consumption, at least for a while; and during the while, surely all the eggs will be eaten (whatever the price they sell for) and the administrative proceeding involving the respondent will probably come to an end (the FTC itself orally estimated before me that a decision in that proceeding will be reached by February 1975). As a result it seems to me that enjoining the respondent's so-called advertising campaign pending the outcome of the administrative proceeding would probably only change the members of the group of people who are going to eat eggs over the next few months and change the number of eggs each member of the group will eat, but would not change the number of eggs eaten.

I have already recognized that, assuming the respondent's pronouncements are at the least misleading or deceptive, the failure to enjoin the respondent will undoubtedly cause some people to be misled in the future. This was a significant factor in my consideration of the public interest. However, another significant factor in assessing the public interest was the previously-noted substantial probability that other people would lose the benefit of becoming more knowledgeable about the cholesterol controversy through reading the respondent's publications if the respondent was now enjoined (be they also misled or not).

Further considerations in my analysis of the public interest were the potential for public misunderstanding about the nature of any injunction ordered against the respondent and the potential for exploitation by parties not now before me of any injunctive relief which is ordered. Both the petitioner and respondent agreed during oral argument that such potentials existed, should be considered, and should be weighed at least to some small extent against the granting of the relief requested. And at least one other court has considered similar potentialities; the Court in *FTC* v. *Sterling Drug, Inc., supra,* said the following:

> "It is not difficult to understand the heartwarming reception this article received in the upper echelons of Sterling and its Madison Avenue colleagues; no sooner were the results of the study published in the Journal of American Medical Association when Sterling Drug and its advertising agencies decided to make the most of them." 317 F.2d at 672.

Just as certain individuals would lose the benefit of the information specifically contained in respondent's publications if an injunction was to issue, so too would the public at large lose certain benefits if the respondent was enjoined. I have already recognized the legitimate public interest in the cholesterol controversy. The benefits to be lost to the public at large if petitioner's request is granted include not only the unavailability of the information contained in the respondent's publications dealing with the controversy, but also the unavailability of any further debate, information and the like which might be stirred by the continuation of the respondent's pronouncements, *i.e.*, the ramifications of the respondent's activities.

Yet another consideration within the phrase 'public interest' must be the effect of any injunctive order on the respondent itself and its members, for they are certainly members of the public and surely other mem-

bers of the public are concerned with their welfare. While it is highly unlikely, there is a possibility that many of the egg producers who are members of the respondent corporation will be financially harmed in a very great way by the issuance of an injunction and this possibility must be taken into account. *FTC* v. *National Health Aids, supra,* 108 F.Supp. at 346. There is the more likely possibility that those in the egg industry will suffer less serious financial difficulties and uncertainties if an injunction is granted and this must also be considered.

Besides failing to carry its most important burden, that of showing the requisite of public interest, the petitioner has also made inadequate showings on the issues of a favorable balance of the equities and the probable chance of success. On this later issue, I do note, however, that the FTC may be in a much better position that I to gauge the public interest, as the term is used in Section 5(b) of the Act, 15 U.S.C. §45(b), because (a) it will have the benefit of a more complete hearing than was held before me, (b) it has the ability according to statute to view the public interest in terms of a possible permanent cease and desist order rather than only in terms of a temporary order of cessation, and (c) it has the benefit of long years of experience as well as expertise in assessing statements with respect to their truthfulness and/or deceptiveness.

In view of all of the foregoing, I decline to grant the injunctive relief sought in the application of the petitioner. This does not constitute a ruling on the merits of the FTC's claims as they now appear before the administrative tribunal.

It is so ordered and decreed.

ENTER:
/s/ James B. Parsons
James B. Parsons
United States District Judge

Date: October 21, 1974

Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1) provides:

> "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

Section 12 of the Act, 15 U.S.C. §52 provides:

> "a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> 1) By United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or
>
> 2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.
>
> b) The dissemination or the causing to be disseminated of any false advertisements within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 5."

Section 13(a) and (b) of the Act, 15 U.S.C. §53(a) and (b) provides:

> "a) Whenever the Commission has reason to believe—
>
> 1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and
>
> 2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Com-

mission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purposes may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

b) Whenever the Commission has reason to believe—

1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

2) that the enjoining thereof pending the issuance of a complaint by the commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public— the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining

order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

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No. 75-405

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL COMMISSION ON EGG NUTRITION,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 517 F.2d 485. The opinion of the district court (Pet. App. 11a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1975. The court of appeals denied a

timely petition for rehearing on June 17, 1975. The petition for a writ of certiorari was filed on September 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment bars a court from temporarily enjoining a trade association, pending conclusion of a Federal Trade Commission proceeding concerning the association's advertisements, from falsely advertising that there is no evidence that consumption of its members' food products may be harmful, where the injunction does not prevent the association from making a fair presentation of its side of the controversy about the possible harm.

2. Whether, in view of the nature of the particular asserted misrepresentations involved in this case, the lower courts properly assessed the apparent falsity of the challenged advertisements on the basis of affidavits, briefs, and oral argument, without a full-scale evidentiary hearing of the sort being conducted by the Commission.

3. Whether Section 13(a) of the Federal Trade Commission Act, in providing that a district court shall issue a temporary injunction upon a showing by the Commission of a reasonable belief that an advertisement for food is false, nevertheless requires the court to apply the traditional criteria for such injunctive relief.

STATUTES INVOLVED

Sections 5, 12, and 13 of the Federal Trade Commission Act, 38 Stat. 719, 52 Stat. 114-115, as amended, 15 U.S.C. 45, 52, and 53, are set forth in pertinent part at Pet. App. 25a-27a. Section 15 of the Act, 52 Stat. 116, as amended, 15 U.S.C. 55, provides in pertinent part:

> For the purposes of sections 12, 13, and 14—
>
> (a)(1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisements, or under such conditions as are customary or usual. * * *
>
> * * * *
>
> (b) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.
>
> * * * *

STATEMENT

Petitioner, a private, not-for-profit corporation composed of representatives of various associations of egg producers, caused paid advertisements to be disseminated in commerce representing in substance that there is no scientific evidence that eating eggs increases the risk of heart disease or of a heart attack. On August 1, 1974, the Federal Trade Commission filed an administrative complaint against petitioner alleging that such advertisements were materially misleading and hence "false" within the meaning of Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, and that petitioner had therefore violated Sections 5 and 12 of the Act, 15 U.S.C. 45 and 52, concerning false advertisements for food. On the same day, the Commission also applied to the district court under Section 13(a) of the Act, 15 U.S.C. 53 (a), for a temporary injunction restraining petitioner from disseminating such advertisements pending completion of the administrative proceeding. (Pet. App. 1a-2a.)

The Commission presented evidence that there is a medical controversy concerning the effects of dietary cholesterol in humans and that there is considerable expert opinion that eating eggs does entail such risks, based upon experimental evidence showing a correlation, and possibly a causal relation, between high levels of dietary cholesterol resulting from eating eggs and other foods with a high cholesterol content and increased risk of heart disease (Pet. App. 2a).

Petitioner presented evidence tending to support its view of the controversy concerning the relationship of dietary cholesterol, egg consumption, and heart disease.

The district court, after hearing oral argument, held that it had jurisdiction over petitioner and its advertising, and that the Commission had demonstrated a reasonable basis for its assertion that the advertisements were false within the meaning of Section 15 (Pet. App. 21a). The court denied the Commission's application for a temporary injunction, however, on the ground that the Commission had not shown that such an injunction "would be to the 'interest of the public' " within the meaning of Section 13(a), and had not otherwise satisfied the traditional equitable conditions for issuance of a temporary injunction (*id.* at 21a-24a).

The court of appeals reversed, holding that the Commission had met all applicable statutory conditions for the issuance of the temporary injunction (*id.* at 2a-6a). The court also directed that an injunction should be entered barring petitioner from disseminating

> statements to the effect that there is no scientific evidence that increased intake of dietary cholesterol resulting from eating eggs increases the risk of heart disease or attendant or related conditions or other statements tending to misrepresent the state of scientific evidence on the subject in question. [*Id.* at 6a.]

The court of appeals provided, however, that "the injunction should not go so far as to prohibit [petitioner] from making a fair presentation of its side of the controversy" (*ibid.*) and should not

> prohibit [petitioner] from stating that there is scientific evidence supporting the theory that dietary cholesterol intake is not harmful, or from describing that evidence, provided that it also states that there is substantial contrary evidence. [*ibid.*] [1]

ARGUMENT

1. Petitioner contends that the decision of the court of appeals conflicts with this Court's recent decision in *Bigelow* v. *Virginia*, No. 73-1309, decided June 16, 1975, because the court of appeals "talismanically swept aside NCEN's First Amendment claims" solely on the ground "that NCEN's publications were 'commercial'" (Pet. 6). In fact, however, the decision did not apply a mechanical rationale.

Thus, the court of appeals recognized that "the First Amendment is not 'wholly irrelevant'" to "commercial advertising" (Pet. App. 5a), and the decision

[1] The injunction applies only to petitioner and does not restrain advertising by petitioner's members. Petitioner's motion asking the district court to vacate the injunction entered by the district court on remand is currently pending.

The administrative proceeding on the merits of the controversy before the Commission has continued. The evidentiary hearing before the administrative law judge of the Commission has been concluded, post-hearing briefs have been filed, and the Commission has ordered the administrative law judge to file his initial decision by November 24, 1975.

expressly preserved petitioner's right to "espouse one side of a genuine controversy" (*id.* at 5a-6a).[2] The court's narrow holding is consistent with the long-accepted proposition that "'[t]here is no constitutional right to disseminate false or misleading advertisements.' *E. F. Drew & Co.* v. *F.T.C.*, 235 F.2d 735, 740 (2d Cir. 1956)" (Pet. App. 6a).[3] The court of appeals' determination of the false and misleading

[2] Although it antedated this Court's decision in *Bigelow*, the court of appeals' decision was not, as *amicus* suggests (Br. 5), based on a "lingering misapprehension that an expansive reading of the doctrine of *Valentine* v. *Chrestenson*, 316 U.S. 52 (1942), was controlling." The majority did not even mention *Valentine*, relying instead on this Court's recent decision in *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 384-389 (Pet. App. 5a), which made clear even before *Bigelow* that *Valentine* was not entitled to an "expansive reading."

[3] The contention of *amicus* that the court of appeals' order abridges petitioner's constitutional rights by compelling it to express an opinion not of its own choosing (Br. 8) is not made by petitioner and is not properly before the court. In any event, the order does not require petitioner to express any opinion about the dietary cholesterol controversy, but rather merely requires it to include in its advertisements a material fact (*i.e.*, that there is contrary evidence) if it does choose to advertise its side of the controversy (Pet. App. 6a). Such affirmative disclosure provisions have long been sustained. *E.g.*, *S.S.S. Co.* v. *Federal Trade Commission*, 416 F.2d 226, 231 (C.A. 6); *Ward Laboratories, Inc.* v. *Federal Trade Commission*, 276 F.2d 952, 955 (C.A. 2), certiorari denied, 364 U.S. 827. *Amicus's* reliance on this Court's decisions concerning the freedom of publishers or operators of other media to determine what they will publish is misplaced, for those cases do not remotely suggest that, to avoid false or misleading representations, an advertiser cannot be required to include a material fact if it chooses to advertise.

character of petitioner's advertisements, in suggesting the absence of a controversy about the health consequences of egg consumption, is not challenged here.

Bigelow does not impair the well-established authority of the government to restrain false, misleading, or fraudulent commercial advertising. That case involved a prosecution of a newspaper editor, whose paper had published in Virginia a truthful advertisement containing information about abortions performed in New York, for violation of a Virginia statute prohibiting the publication of information about abortions. In holding the statute unconstitutional as applied, the Court rested on the state's lack of any valid regulatory interest in the subject of the advertisements. However, the Court specifically noted that its decision did not apply to "deceptive or fraudulent" advertisements (slip op. 18) and that a different case might be presented if the statute were applied "against the advertiser" rather than the publisher (*ibid.*). Petitioner's claim of a conflict with *Bigelow* is without substance.[4]

2. Petitioner contends that the court of appeals followed a "constitutionally defective procedure" (Pet. 7) in finding, on the record before it, that petitioner's advertisements falsely represented the absence of a genuine scientific controversy and, in any event, that the Commission showed reason to believe that petitioner had done so. That claim is incorrect.

[4] Since no question of the application of the First Amendment to false advestisements is presented in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Councils*, No. 74-895, probable jurisdiction noted, 420 U.S. 971, there is no reason to hold this petition pending the disposition of that case.

The concurrent findings of the courts below that the Commission had the requisite reason to believe that petitioner's advertisements were false were based on a factual record made at an adversary judicial hearing at which petitioner had an opportunity to present evidence. After noting that in some cases "a full evidentiary hearing" might be required (Pet. App. 14a), the district court properly concluded that "in the present case" such a hearing was "unnecessary" (*id.* at 16a). See *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, 412 F.2d 541, 546 (C.A. 9). Petitioner has not shown how it was prejudiced by that ruling, and its real grievance is with the factual conclusion of the courts below, not with the basis on which it was reached.

In any event, this Court's decisions do not invariably require a full-scale evidentiary hearing before a court may temporarily enjoin commercial advertisements that the Commission has shown reason to believe are materially deceptive and false, and the question whether such a hearing might have been required in this case is of insufficient general importance to warrant review.[5]

[5] The decision below does not conflict with *Blount* v. *Rizzi*, 400 U.S. 410. The Court there held unconstitutional a statute requiring a district court, upon the Postmaster's showing of

3. Finally, petitioner contends that the court of appeals failed to follow its prior decisions in *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F.2d 744 (C.A. 7), and other cases, which, petitioner claims, read Section 13(a) as implicitly incorporating all the traditional criteria for equitable relief (Pet. 10-11). Even if there were such a conflict, however, that would be a matter for resolution by the court of appeals, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

In any event, the court of appeals specifically followed *Rhodes Pharmacal*, which it termed "controlling in this case" (Pet. App. 4a-5a), in holding that the Commission was entitled to relief under Section 13(a) upon a satisfactory showing of the requisite "reason to believe" that petitioner's advertisements

---

probable cause to believe that a person was using the mails to sell or disseminate obscene matters, to grant an injunction directing the Post Office to detain all of the person's incoming mail pending the conclusion of administrative proceedings. Under the injunction, the person would have been entitled to receive only such mail as was determined by the Post Office to be "clearly not connected with the alleged unlawful activity," and would have had to go to the Post Office to open the detained mail before that determination could be made (400 U.S. at 414). In finding this sweeping remedy constitutionally deficient, the Court stressed the broad impact of the injunction on a person's use of the mails (*id.* at 416), and stated that " 'constitutionally protected expression * * * is often separated from obscenity only by a dim and uncertain line * * *' " (*ibid.*). Neither consideration is applicable here: "false" advertising does not present definitional difficulties such as those that have long plagued the law of "obscenity," and the injunction is limited in scope to the particular type of advertising in question.

were false, without having to satisfy all the traditional equity standards (*id.* at 5a). Accord, *Federal Trade Commission* v. *Thomsen-King & Co.*, 109 F.2d 516 (C.A. 7); *Securities & Exchange Commission* v. *Frank*, 388 F.2d 486, 492 (C.A. 2) (dictum).[6] The court of appeals' decision was correct, and there is no conflict requiring resolution by this Court.[7]

---

[6] In claiming a conflict petitioner relies (Pet. 12) upon the district court decision in *Federal Trade Commission* v. *Sterling Drug, Inc.*, 215 F. Supp. 327, 332 (S.D.N.Y.), affirmed, 317 F.2d 669 (C.A. 2). The court of appeals' affirmance in that case, however, rested upon the determination that the Commission had failed to demonstrate reason to believe the advertisements were false, and the court expressly refrained from endorsing the district court's ruling as to the applicability of traditional equitable standards (317 F.2d at 678).

[7] In any event, since the court of appeals found in this case that the challenged advertisements were in fact false (Pet. App. 6a), this is not an appropriate vehicle for determining the circumstances in which an injunction should issue based only on the Commission's showing of reason to believe that a food advertisement is false.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

Petitioner has called to the Court's attention the recent decision of the Ninth Circuit in *Federal Trade Commission* v. *Simeon Management Corp.*, No. 75-2363, decided March 2, 1976. We are filing this supplemental memorandum, pursuant to Rule 24(5) of this Court's Rules, to discuss the bearing of the *Simeon* decision on the petition for a writ of certiorari in this case.

The Ninth Circuit in *Simeon* affirmed a district court's denial of a temporary injunction against the dissemination by a group of weight-reduction clinics of allegedly false advertisements that induced the purchase of drugs. The court of appeals held that "a 'reasonable belief' on the part of the FTC [that the advertisements are false] is insufficient to constitute a 'proper showing' " under 15 U.S.C. 53(a) for the granting of injunctive relief pending the completion of administrative cease-and-desist proceedings

(slip op. 5). The court of appeals ruled that the district court was required "independently to determine whether an injunction would be in the public interest" and that "[t]he court must base this determination on the likelihood that the FTC will succeed on the merits in proceedings for a final cease-and-desist order and on the balance of equities" (slip op. 6-7).

That ruling conflicts with the holding of the court of appeals in the present case that, under 15 U.S.C. 53(a), the Commission is *not* required "to justify its request for an injunction on the basis of a balancing of the equities and the likelihood of ultimate success" (Pet. App. 5a). Under the Seventh Circuit's decision—which we believe to be correct—a temporary injunction should be granted upon a showing by the Commission that it has reason to believe both that the advertisements are false and that "an injunction would be in the best interest of the public" (*ibid.*).

Although the courts of appeals are in disagreement over the proper construction of 15 U.S.C. 53(a), the results in the two cases are not necessarily inconsistent. The Ninth Circuit's opinion in *Simeon*, for example, suggests that the panel might have reached the same result even if it had applied the Seventh Circuit's standard. The discussion in *Simeon* of the Commission's likelihood of success on the merits (slip op. 7-11) is consistent with a view that the Commission failed in that case to make even the showing of reasonable belief required by the Seventh Circuit in the present case. Similarly, the Seventh Circuit in this case found not only that the Commission had a reasonable belief in the falsity of petitioner's advertisements, but also that the advertisements were in fact "false and misleading" (Pet. App. 6a). Compare *Simeon* slip op. 8-9, 11.

In any event, the disagreement between these two courts need not be resolved by this Court at the present time.

The statutory issue arises infrequently. Since 1973, when Section 53 was amended to add subsection (b) (see Pet. App. 4a-5a), the Commission has instituted only four temporary injunction actions under Section 53(a), including the present case and *Simeon*. The Commission has accordingly concluded that the apparent differences between the Seventh and Ninth Circuits probably will not significantly impede its administration of the Federal Trade Commission Act, and it has therefore determined not to seek certiorari in *Simeon*.

If the existing conflict persists, and if the issue becomes more important, future opportunities for resolving the conflict will almost surely be presented. We do not believe that plenary review is required in the present circumstances.

For the reasons stated in this memorandum and in our initial brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 75-405

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-405.

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

For the reasons hereinafter stated, the Association of National Advertisers, Inc., *amicus curiae,* respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit in this case.

INTEREST OF AMICUS CURIAE.

The *amicus curiae* is an association of enterprises which utilize the advertising media for purposes of bringing information about their products and services to the attention of consumers and the public. The essence of this case is the question whether a governmental authority may freely censor such communications because of their commercial content despite the First Amendment's guarantees of freedom of speech and the press. The case also raises important questions as to the proper construction of provisions of the Federal Trade Commission Act that are of necessity applicable to the *amicus curiae* and its members. It is plain, therefore, that the decision by this Court in this case will have significant effects on the *amicus curiae* and each of its members.

CONSENT OF THE PARTIES.

Both the petitioner and respondent have granted permission for this *amicus curiae* brief to be filed and the letters of permission are filed in the office of the Clerk.

QUESTIONS PRESENTED.

I. Is petitioner deprived of its First and Fifth Amendment rights by being subjected without a plenary adversary judicial hearing to a prior restraint on its expression of opinion about a controversial issue of fact on a subject of public interest?

II. May the Federal Trade Commission secure an injunction against petitioner's expression of opinion on a controversial subject simply because the statement was made in a commercial context and the Commission believes the petitioner's statement to be false and misleading, in the absence of an adversary hearing on the merits in the Commission or before any court?

III. Is not the Federal Trade Commission, in seeking an injunction under § 13(a) of the Federal Trade Commission Act against petitioner's freedom of expression, required to satisfy the procedural requirements of the First Amendment and to establish to the satisfaction of a court of equity the right to such relief?

REASONS FOR GRANTING THE WRIT.

The issues presented by this case are of widespread importance for the administration of the Federal Trade Commission Act. Two kinds of questions are intertwined. Both call for review by this Court. The first relates to the substantive rights of advertisers under the First Amendment to speak their minds on controversial issues of public interest relevant to their products. The second relates to the procedural rights of advertisers necessary to protect their First Amendment rights against invasion by the Federal Trade Commission. For any First Amendment rights that advertisers may have will necessarily be rendered nugatory by the provisions of § 13(a) as interpreted by the Court of Appeals below. Moreover, the decision of the Court of Appeals is in conflict with the opinions and judgments of this Court that define the substantive and procedural rights protected by the First and Fifth Amendments to the Constitution on issues that do and will recur frequently in the administration of the Federal Trade Commission Act.

I.

THIS CASE PRESENTS IMPORTANT ISSUES OF FREEDOM OF SPEECH THAT ARE NOW PENDING BEFORE THIS COURT, AWAITING ORAL ARGUMENT AND DECISION IN THE CASE OF VIRGINIA STATE BOARD OF PHARMACY vs. VIRGINIA CITIZENS CONSUMER COUNCIL, NO. 74-895.

The decision below, which concerned the scope of freedom of speech expressed in a "commercial" context, was rendered prior to this Court's decision in *Bigelow* v. *Virginia*, ... U. S. ..... (1975), which was decided on the same day that the Court of Appeals below denied the petitioner's motion for rehearing.

The consequence is that the Seventh Circuit decision was made by the Court of Appeals under the lingering misapprehension that an expansive reading of the doctrine of *Valentine* v. *Chrestenson*, 316 U. S. 52 (1942), was controlling. Now that this Court, in *Bigelow*, has imposed serious restrictions on the scope of the *Valentine* decision, the questions arise, in what circumstances, form, or manner may government inhibit freedom of oral and written expression simply because it is pronounced in a "commercial" context. That question is presented in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, No. 74-895, pending decision in this Court. (We have filed a brief *amicus curiae* in that case.)

In the instant case, the same question arises, except that the speech involved here is a statement of position on an issue that is hotly contested among scientists and the public in general. The meaning that lower courts will be obliged to give to *Bigelow* is fundamentally involved both in *Virginia State Board of Pharmacy* and this case. Since the Court is already committed to undertake explication of the issue in the *State Board of Pharmacy* case, it should do so here as well.

II.

THE COURT BELOW DISPOSED OF SERIOUS FIRST AMENDMENT ISSUES, RAISED BY FEDERAL TRADE COMMISSION CENSORSHIP, IN A MANNER THAT IS SQUARELY IN CONFLICT WITH THE DECISIONS AND JUDGMENTS OF THIS COURT.

The issue in this case is raised by the fact that the Court of Appeals for the Seventh Circuit has assumed that petitioner could be prevented from revealing to the public its views in a controversy that is widely debated both in scientific media and general publications simply because the petitioner's views support the economic interests of its membership. Not only does the court below justify prior restraint of speech of the petitioner, but

it does so on the ground that petitioner is not entitled to a prior hearing even on the issue of truthfulness either before the F. T. C. or the federal court. Thus, the error of prior restraint is compounded by the error of denial of appropriate process.

The question is focused by the fact that none would dispute the right of Drs. Marmot, Friedman and Rosenman to make a statement of the same kind as that made by petitioner. See Time Magazine, 18 Aug. 1975, pp. 54-55. But, because the petitioner has an economic interest in the outcome of the controversy, it is thought by the lower court that petitioner has lost the protections otherwise available under the First and Fifth Amendments of the Constitution. We submit that such a conclusion calls for review by this Court to ascertain whether it is consistent with the decisions that this Court has rendered in the area of protection of freedom of speech.

A. The Decision Below Is in Direct Conflict with This Court's Decision in Blount v. Rizzi, 400 U. S. 410 (1971).

The court below construed § 13(a) of the Federal Trade Commission Act to mean that where the F. T. C. has "reasonable cause" to believe that petitioner's speech was in violation of § 12 of the Act, an equity court is bound to issue an injunction against petitioner's right to express its views. It was exactly this interpretation of 39 U. S. C. §§ 4006 and 4007 that caused this Court to hold those federal statutes unconstitutional. *Blount* v. *Rizzi*, 400 U. S. 410 (1971). Indeed, this case is a fortiori, in light of the fact that in *Rizzi*, under § 4006, "the Department holds a trial-type hearing at which a full record is transcribed. . . . No § 4006 order may issue against the defendant until completion of the administrative hearing." 400 U. S. at 412-13. Here, there was not even an administrative hearing requirement. The procedure here was rather like that under § 4007, which authorized "the Postmaster General . . . upon a showing of probable cause to believe the statute is being violated, [to secure]

a temporary restraining order and preliminary injunction." *Id.* at 414.

The standards for governmental censorship were cogently and concisely stated in *Rizzi*, 400 U. S. at 417:

> The procedure established by § 4006 and the implementing regulations omit those "sensitive tools" essential to satisfy requirements of the First Amendment. The three-judge courts correctly held in these cases that our decision in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), compels this conclusion. We there considered the constitutionality of a motion picture censorship procedure administered by a State Board of Censors. We held that to avoid constitutional infirmity a scheme of administrative censorship must: *place the burdens of initiating judicial* review *and of proving that the material is unprotected expression on the censor;* require "prompt judicial review"—a final judicial determination on the merits within a specified, brief period —to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution any restraint imposed in advance of the final judicial determination. 380 U. S. at 58-60. [Emphasis added.]

This Court went on to hold that the full-blown hearing before the administrative agency did not satisfy the First Amendment's demands in this area. A fortiori, this is true here where there has been no full-blown adversary-type hearings on the question of the propriety of the censorship.

This Court then went on to hold that the judicial process under 39 U. S. C. § 4007, which parallels that under 15 U. S. C. § 13(a) here, did not satisfy the requirements of the First Amendment. The Court there said, 400 U. S. at 420:

> Second, the district court is required to grant the relief sought by the Postmaster General upon a showing merely of "probable cause" to believe § 4006 is being violated. We agree with the three-judge court in Book Bin that to satisfy the demand of the First Amendment "it is vital that prompt judicial review on the issue of obscenity—

rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked." 306 F. Supp., at 1028.

And the Court noted 400 U. S. at 421-22, a further deficiency that is equally applicable here:

> The appellees here not only were not afforded "prompt judicial review" but they "can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by [their] own initiative. During the interim, the prolonged threat of an adverse administrat[ive] decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of [appellees'] First Amendment rights—all without a *final* judicial determination of obscenity." 306 F. Supp., at 1028.

In light of the square conflict between the decision of the court below and the decision by this Court in *Rizzi*, certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

B. The Government May Not, Under Decisions of This Court, Either Forbid the Expression of Opinion or Compel the Expression of Opinion. The Decision of the Court Below Authorizes Both and Is Inconsistent with This Court's Decisions.

The Court of Appeals in this case not only granted the F. T. C.'s injunction telling the petitioner what opinions it could not express: at the same time it imposed a requirement on the petitioner as to what it was to say, if it were to say anything, on the controverted issue.

This Court has consistently and persistently forbidden government in this country to compel anyone to utter ideas, observations, or opinions that were not of his own choosing. See, *e.g.*, *Epperson* v. *Arkansas*, 393 U. S. 97 (1968); *Miami Herald* v. *Tornillo*, 418 U. S. 241 (1974); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974). The decision below is inconsistent with the doctrines established by this Court in these opinions and many others.

Moreover, the history of this Court's interpretation of the First Amendment is replete with judgments forbidding censorship of private communications, unless the communication itself is proved by appropriate procedures to be properly deemed illegal and constitutionally unprotected, as in the obscenity cases, or that the communication is such as to incite or effect illegal actions other than the communication itself. Neither untruthfulness, see, *e.g.*, *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), nor distastefulness, see, *e.g.*, *Cohen* v. *California*, 403 U. S. 15 (1971); *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972), nor inconvenience, see, *e.g.*, *Organization for a Better Austin* v. *O'Keefe*, 402 U. S. 415 (1971), of the speech is adequate warrant for governmental suppression of opinion. In the libel cases, for example, this Court has held that a finding of the false content of the publication cannot strip the First Amendment protections of the publisher. *New York Times Co.* v. *Sullivan, supra*, 376 U. S. at 272. Rather, the inquiry must focus on the conduct of the publisher. Recovery can be had only when it is proved "that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 153 (1967). See, also, *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967). In this case, the FTC contends that alleged falsity alone is enough not only for a finding of illegality, but to compel a court of equity to issue a prior restraint against petitioner's speech.

Again, the decision of the court below is inconsistent with these principles long established by the decisions of this Court. Because of the inconsistency between the decision of the court below and these decisions by this Court, certiorari should issue in this case.

III.

THE STATUTORY INTERPRETATION OF § 13(a) OF THE FEDERAL TRADE COMMISSION ACT BY THE COURT BELOW IS INCONSISTENT WITH THE LEGISLATIVE WILL AND RENDERS THE STATUTE UNCONSTITUTIONAL.

Section 13(a) of the Federal Trade Commission Act, 15 U. S. C. § 53(a), provides that:

> Whenever the Commission has reason to believe—
>
> (1) that any person . . . is about to engage in . . . the dissemination or the causing of the dissemination of any advertising in violation of Section 12 of this title, and
>
> (2) that the enjoining thereof . . . would be to the interest of the public, the Commission . . . may bring suit . . . to enjoin the dissemination . . . of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. . . .

The Court of Appeals for the Seventh Circuit has held in this case that under this language the federal court from which the injunction is sought need only find that the F. T. C. had reasonable cause to believe that the alleged violation would take place. It rejected the notion that the F. T. C. had even the burden to show that the greater equities were on its side, no less that irreparable harm would result from the failure to grant the equitable relief sought.

A. The Seventh Circuit Construction Is Inconsistent with the Construction Given § 13(a) by Other Federal Courts.

The court in *Federal Trade Commission* v. *National Health Aids,* 108 F. Supp, 340, 346 (D. Md. 1952), read the statute more in keeping with the general requirements of due process and legislative intent. It said:

> [It] was hardly the intention of Congress to require a district court in the exercise of the extraordinary remedy of injunction to proceed affirmatively merely on the basis of the reasonable belief of the administrative agency. Very important rights may be affected by the issuance of an injunction. . . . action should be withheld unless the facts fairly require affirmative relief in the public interest. . . . The reasonable belief of the Commission is sufficient to warrant its application for the injunction, but the actions of the Court should be based on the general consideration that properly apply in the issuance of preliminary injunctions.

Obviously this is a higher standard of proof than the Seventh Circuit would require, one more in keeping with the concept of injunctions as extraordinary remedies and, as will be shown, with the notions of Congressional purpose. It is, even so, short of the requirements that must be met when the injunction sought is a prior restraint on speech. *Blount* v. *Rizzi, supra.*

The case of *Federal Trade Commission* v. *Simeon Management Corp.*, 391 F. Supp. 697, 700 (N. D. Cal. 1975), aligned itself with the *National Health Aids* standard rather than that of the Seventh Circuit:

> Reasonable belief of a violation is enough to justify the FTC seeking a preliminary injunction, but in evaluating the motion for preliminary injunction, the District Court must look to the FTC's reasonable cause to believe that a violation has taken place, and must also as a separate factor weigh the equities in favor of granting or denying the preliminary injunction.

B. The Seventh Circuit Construction Is Inconsistent with the Expressed Intent of the Congress.

In 1973, Congress added § 13(b) to the Federal Trade Commission Act, 15 U. S. C. § 53(b). In that section it used language expressive of the construction given by the *National Health Aids* case. Section 13(b) provides:

> (b) Whenever the Commission has reason to believe—
>
> (1) that any person . . . is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

> (2) that the enjoining thereof . . . would be in the interest of the public—
>
> The Commission . . . may bring suit . . . to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a temporary restraining order or preliminary injunction may be granted. . . .

The Seventh Circuit read the difference in the language of the two paragraphs to justify the adoption of a lower standard of proof for § 13(a) actions than for § 13(b) actions. This rejected the fact that, in writing § 13(b), Congress assumed that it was codifying the law as established by § 13(a) and the *National Health Aids* case. See *Joint Statement of the Committee on Conference*, ¶ 16, H. R. Rep. No. 93-624, 93d Cong., 1st Sess. 31 (1973). This construction also resulted in the anomalous interpretation that a lower standard of proof is required for an injunction against publication of speech, which is all that § 13(a) is concerned with, than for injunctions against substantive violations of the Federal Trade Commission Act, which is the concern of § 13(b).

C. The Seventh Circuit Construction Clearly Raises the Issue of First Amendment Invalidity of the Statute.

Because § 13(a) affords a procedure for the issuance of a prior restraint against speech, and because—under the Seventh Circuit's interpretation—there is no requirement of a trial-type hearing on the issues of fact, nor of the use of standards generally applied to the issuance of injunctions, the construction given by the Seventh Circuit should be rejected. Whatever construction of the statute may be chosen raises questions about the constitutionality of the prior restraint. And the statute, under any construction, contains no standards for the imposition of censorship, whether the statute imposes prior restraint or punitive sanctions. The construction chosen by the Seventh Circuit clearly

suggests the unconstitutionality of the statute, while the alternative interpretations may be less vulnerable to constitutional attack. See *Blount* v. *Rizzi, supra; New York Times Co.* v. *Sullivan, supra; Curtis Publishing Co.* v. *Butts, supra; Beckley Newspapers Corp.* v. *Hanks, supra.* Under these circumstances, this Court has clearly imposed a rule that would choose that interpretation of a law which does not create serious doubts of the statute's constitutionality. As the Court stated in *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Accord, e.g., United States v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971); *Watts* v. *United States*, 394 U. S. 705, 707 (1969); *Schneider* v. *Smith*, 390 U. S. 17, 26 (1969); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953).

Because the court below construed an important statute in a manner that puts its constitutionality in serious question; because the court below construed an important statute in a manner inconsistent with the clear legislative intent; and because the court below construed an important statute in a manner inconsistent with that of other federal courts passing on the question, this Court should grant certiorari to review the judgment below.

CONCLUSION.

For the reasons herein stated, the *amicus curiae* urges that this Court grant the petition for certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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